

\*\*E-Filed 5/17/2011\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURG, PA, a Pennsylvania  
Corporation,

Plaintiff,

v.

RESOURCES DEVELOPMENT SERVICES,  
INC., et al.,

Defendants.

Case Number 5:10-cv-01324-JF/PVT

ORDER<sup>1</sup> DENYING MOTIONS TO  
DISMISS AS TO ALL MOVING  
DEFENDANTS OTHER THAN JLV  
AND GRANTING MOTION AS TO  
JLV

[re: docket nos. 147, 149, 151, 152, 153,  
154, 155, 156, 157, 158]

Plaintiff National Union brings this insurance subrogation action to recover funds paid to Waste Management Corporation as a result of an alleged fraudulent scheme. National Union asserts that several trucking companies, acting through their broker, Resource Development Services, Inc. (RDS), made illegal payments to Waste Management employees to allow their trucks to dump waste at a Waste Management landfill without proper processing. National Union has sued RDS, five RDS employees, twenty-six trucking companies, and eight Waste

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<sup>1</sup> This disposition is not designated for publication in the official reports.

1 Management employees for fraud and related claims. Defendant trucking company Valley  
 2 Recycling moves to dismiss the complaint for failure to state a claim and failure to plead fraud  
 3 and conspiracy with particularity as required by Federal Rule of Civil Procedure 9(b). Seven  
 4 other trucking company defendants move to join Valley Recycling's motion.<sup>2</sup> Defendant  
 5 Premier Recycling also moves to dismiss and to strike the complaint's prayer for punitive  
 6 damages.

## 7 I. BACKGROUND

8 National Union brings this action as subrogee of Waste Management, which is the  
 9 operator of several landfills including the Kirby Canyon Landfill (KCL).<sup>3</sup> Operating as a broker,  
 10 RDS negotiated disposal rates at Waste Management landfills for the defendant trucking  
 11 companies. RDS was responsible for making payments to Waste Management for loads  
 12 disposed of by the trucking company defendants.

13 National Union claims that between December 2005 and May 2008 trucks operated by  
 14 the defendant trucking companies disposed of waste at KCL without proper processing; the  
 15 trucks either were not processed at all or the waste was classified improperly in order to reduce  
 16 the charge. The complaint alleges further that Waste Management employees permitted  
 17 unprocessed and misclassified loads to enter KCL "in exchange for improper monetary payments  
 18 . . . made to them by RDS and its principals," as well as by trucking company defendants  
 19 including Pacific Coast Recycling and Gibson Resource Group. SAC ¶ 64.

20 National Union asserts that each of the trucking company defendants was aware that it  
 21 was Waste Management's practice and standard industry protocol for landfills to process loads  
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23  
 24 <sup>2</sup> The trucking company defendants seeking joinder are A&S Metals, Randozzo  
 25 Enterprises, Dominguez & Sons, Pacific Coast Recycling, Gibson Resource Group, Bay Area  
 Hauling Maintenance, JLV Equipment.

26 <sup>3</sup>For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the  
 27 court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*  
 28 *McKeithen*, 395 U.S. 411, 421 (1969). The relevant facts are drawn from National Union's  
 Second Amended Complaint and related exhibits.

1 by weight and classification of materials. Each of the companies is alleged to have known that  
2 its loads were not being processed properly either because it did not receive weight tickets  
3 processed by Waste Management or because it received weight tickets misrepresenting the  
4 materials dumped. In addition, National Union alleges that the trucking company defendants  
5 intentionally acted to avoid Waste Management processing protocols in the following ways: On  
6 at least one occasion, on the orders of James Lucero, an RDS employee contacted “each and  
7 every one of the trucking company defendants via telephone . . . and notif[ied] each of them to  
8 be at KCL at 5:00 a.m., before the landfill opened, and their respective trucks would be allowed  
9 to bypass the scale without proper processing and ticketing.” SAC ¶ 69. At some time in or  
10 around June 2007, each of the trucking company defendants was instructed by Lucero that no  
11 dumping was to occur on Saturday, although KCL was normally open for dumping on that day.  
12 Similarly, at some time during this period, the trucking company defendants were informed not  
13 to bring loads to KCL on Tuesday afternoons because a particular KCL employee would be  
14 present in the scale house performing audit functions. On the other hand, in or around August  
15 2007, each of the trucking company defendants was instructed that is was a “good week to  
16 dump” at KCL. SAC ¶ 71.

17 The complaint includes additional allegations with respect to particular trucking company  
18 defendants: that a driver for Valley Recycling was advised by Valley Recycling’s owner to be at  
19 KCL by 5:00 am, and that he would be allowed to bypass the scales, SAC ¶ 76(a); that RDS and  
20 Lucero instructed Randazzo Enterprises that its trucks could enter KCL without being processed  
21 by simply stating “Moffit” or “Randazzo,” SAC ¶ 76(b); that the owner of Gibson Resource  
22 Group personally delivered an envelope of cash on behalf of Lucero to a Waste Management  
23 employee participating in the scheme, SAC ¶ 77; and that Pacific Coast Recycling made  
24 improper monetary payments directly to Waste Management employees, SAC ¶ 64.

25 National Union also alleges that the invoices provided by RDS to the trucking company  
26 defendants distinguished between processed and unprocessed loads, that the trucking company  
27 defendants described the unprocessed loads as “extra loads,” and, that, contrary to industry  
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1 practice, the companies were charged a flat rate for all loads rather than a rate based on the  
 2 weight and material of each load. SAC ¶ 76. In addition, the rates charged for the loads  
 3 allegedly were unreasonably low. *Id.*

## 4 II. STANDARD OF REVIEW

5 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed  
 6 against a defendant for failure to state a claim upon which relief may be granted; dismissal may  
 7 be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged  
 8 under a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104  
 9 (9th Cir. 2008). For purposes of a motion to dismiss, the plaintiff's allegations are taken as true,  
 10 and the court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*  
 11 *McKeithen*, 395 U.S. 411, 421 (1969). At the same time, "[w]hile a complaint attacked by a  
 12 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's  
 13 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and  
 14 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell*  
 15 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "[W]here the  
 16 well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,  
 17 the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

18 While all pleadings must state a claim showing that the pleader is entitled to relief, *see*  
 19 Fed. R. Civ. P. 8(a), a "party must state with particularity the circumstances constituting fraud,"  
 20 Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is to deter the filing of complaints "as a pretext  
 21 for the discovery of unknown wrongs," to protect professionals from the harm that comes from  
 22 being subject to fraud charges, and to "prohibit [] plaintiffs from unilaterally imposing upon the  
 23 court, the parties and society enormous social and economic costs absent some factual basis." *In*  
 24 *re Stat. Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (quoting *Semegen v. Weidner*, 780  
 25 F.2d 727, 713 (9th Cir. 1985)). Accordingly, Rule 9(b) requires a plaintiff to be "specific  
 26 enough to give defendants notice of the particular misconduct which is alleged to constitute the  
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1 fraud charged so that they can defend against the charge and not just deny that they have done  
 2 anything wrong.” *Swartz*, 476 F.3d at 764 (internal quotation marks and citation omitted). “In  
 3 the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify  
 4 the role of each defendant in the alleged fraudulent scheme.” *Swartz*, 476 F.3d at 765 (internal  
 5 quotation marks and citation omitted). The plaintiff must set forth more than the neutral facts  
 6 necessary to identify the transaction but also must explain why the statement or omission  
 7 complained of was false or misleading. *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541,  
 8 1548 (9th Cir. 1994). However, the defendant’s scienter, or knowledge of falsity, may be  
 9 alleged generally. *Id.*

### 10 III. DISCUSSION

11 National Union asserts five claims for relief against the trucking company defendants:  
 12 fraudulent concealment, trespass, invasion of private occupancy, negligent disposal of material,  
 13 and aiding and abetting fraud. Nine of the trucking company defendants have moved to dismiss.

#### 14 1. Conspiracy

15 National Union alleges that “[b]y virtue of each trucking company defendant entering  
 16 onto KCL and dumping waste material without a proper ticket, a conspiracy was formed between  
 17 each trucking company defendant and all other defendants.” FAC ¶ 67. While conspiracy is not  
 18 a separate claim for relief, the allegation of conspiracy is necessary for the trucking company  
 19 defendants to be held liable for the alleged wrongful acts of RDS or Waste Management’s  
 20 employees.

21 Civil conspiracy is “a legal doctrine that imposes liability on persons who, although not  
 22 actually committing a tort themselves, share with the immediate tortfeasors a common plan or  
 23 design in its perpetration.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503,  
 24 510-11 (1994) (citation omitted). “By participation in a civil conspiracy, a coconspirator  
 25 effectively adopts as his or her own the torts of other coconspirators within the ambit of the  
 26 conspiracy.” *Id.* at 511. A claim for civil conspiracy requires actual commission of the  
 27 underlying tort. *Id.* Under California law, liability for civil conspiracy has three elements: (1)  
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1 formation of the conspiracy (an agreement to commit a wrongful act); (2) operation of the  
2 conspiracy (commission of the wrongful acts); and (3) damage resulting from the operation of  
3 the conspiracy. *See People v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102 (Cal. App. Ct. 2003).  
4 Rule 9(b) imposes heightened pleading requirements where “the object of the conspiracy is  
5 fraudulent.” *Swartz*, 476 F.3d at 765.

6 National Union’s amended complaint adds a significant amount of factual detail with  
7 respect to illicit payments made by James Lucero and other RDS employees, as well as some  
8 trucking company defendants, to Waste Management employees in exchange for those  
9 employees allowing the trucking company defendants to dump at KCL without processing or  
10 with improper processing. *See SAC* ¶ 77-80. National Union alleges that it has incurred more  
11 than \$13 million in damages from the operation of the conspiracy. *Id.* ¶ 109. The remaining  
12 issue is whether National Union has alleged sufficiently the formation of the conspiracy between  
13 RDS and each of the trucking company defendants.

14 National Union contends that the trucking companies dumped waste at KCL without  
15 proper processing, and that the companies did so knowing of the alleged improper payments to  
16 Waste Management employees. In its order dismissing National Union’s earlier pleading, the  
17 Court observed that in order to plead agreement to form a conspiracy, National Union must  
18 allege more than the fact that trucking company defendants continued dumping at KCL and the  
19 bare conclusion that they knew of fraudulent activity by RDS and Waste Management  
20 employees. In particular, the Court observed that “allegations of clandestine dumping or  
21 unreasonable payments to RDS are of the type needed to support allegations of a conspiracy.”  
22 Order of Nov. 16, 2010 at 6.

23 The SAC does provide more factual support for National Union’s claims. National  
24 Union now alleges that James Lucero and RDS instructed trucking company defendants to dump  
25 loads at KCL outside of normal hours of operation and to avoid dumping at KCL on certain  
26 days. In addition, the complaint alleges that the trucking company defendants were charged  
27 “unreasonably low” fees by RDS for their shipments and were charged a flat rate per load rather  
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1 than by the customary practice of basing price per load on the weight and type of material  
2 dumped.

3 Defendants contend that these allegations still do not provide an adequate factual basis  
4 for National Union's theory that the trucking companies knew that the processing procedures  
5 were improper. This case can usefully be compared with *Neubronner v. Milkin*, 6 F.3d 666 (9th  
6 Cir. 1993), in which the Ninth Circuit expounded on Rule 9(b)'s particularized pleading  
7 requirement in some detail. In that case, the plaintiff's complaint, which alleged that the  
8 defendant had engaged in insider trading, failed to meet the requirements of Rule 9(b). The  
9 court concluded that the complaint only alleged the "suspicious circumstances" that defendant  
10 was an investment banker for plaintiff and that plaintiff eventually sank into financial trouble.  
11 The court noted that plaintiff "does not allege specifically what information [defendant]  
12 obtained, when and from whom he obtained it, and how he used it for his own advantage." *Id.* at  
13 671.

14 Here, National Union has alleged more than merely "suspicious circumstances." It  
15 alleges that Defendants were told to dump material outside of business hours, made unusual  
16 financial arrangements, and received instructions from Lucero to avoid dumping when certain  
17 Waste Management employees were present at KCL. The allegations that the defendant trucking  
18 companies received instructions to engage at dumping at KCL outside of ordinary operating  
19 hours and were told not to dump at a certain time because a certain employee would be present  
20 performing an audit are factual allegations which at this stage of the pleadings must be taken as  
21 true. The Court must also accept as true National Union's allegations that the billing procedures  
22 and rates used for the trucking company defendants by RDS were inconsistent with industry  
23 standards. In addition, the allegations that the trucking company defendants were told to avoid  
24 dumping on Saturdays during one period and told during another period that it was "a good week  
25 to dump" provide additional, albeit circumstantial, support for National Union's conclusion that  
26 the trucking company defendants each engaged in activity furthering the conspiracy.

27 Defendants nonetheless claim that National Union's allegations lack specificity and give  
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1 Defendants inadequate notice of the conduct with which they are charged. It is true that the SAC  
2 does not provide the date or dates of alleged dumping outside of business hours or the names of  
3 the individuals to whom Lucero and his employees spoke at each company. However, “the  
4 general rule that allegations of fraud based on information and belief do not satisfy Rule 9(b)  
5 may be relaxed with respect to matters within the opposing party’s knowledge.” *Nuebronner*, 6  
6 F.3d at 671. While National Union’s allegations lack precision, the Court concludes that they  
7 give Defendants sufficient notice of the misconduct to enable Defendants to respond to the  
8 complaint. In their moving papers, Defendants identify several arguments that they could assert  
9 as defenses, including contesting the irregularity of the billing arrangement with RDS,  
10 explaining why the instructions given by Lucero did not raise suspicions, and articulating their  
11 practices with respect to weight tickets. While Rule 9(b) serves to protect defendants from suits  
12 that are little more than fishing expedition for unknown wrongs, the bar is not set so high as to  
13 require a plaintiff to prove its case in order to plead it.

14 In its motion for joinder, Defendant JLV Equipment contends that according to the  
15 exhibits attached to the complaint, it dumped materials at KCL only on eight days in September  
16 2006, several months before Lucero allegedly instructed the trucking companies to dump or not  
17 to dump. In light of the fact that there are no specific allegations that JLV continued to dump  
18 after it was alleged to have knowledge of the fraudulent scheme, National Union cannot support  
19 its allegation that JLV participated in the conspiracy. While it is possible that the other alleged  
20 wrongful acts occurred during the period in which JLV dumped at KCL, the instant complaint  
21 does not allege such facts with sufficient specificity with respect to JLV. Accordingly, the  
22 motion to dismiss will be granted, without prejudice, as to JLV.

## 23 **2. Fraudulent Concealment**

24 National Union alleges that each defendant intentionally concealed both the trucking  
25 company defendants’ improper dumping at KCL and the RDS defendants’ illicit payments to  
26 Waste Management employees and failure to pay Waste Management unprocessed or  
27 misprocessed loads. SAC ¶ 76. The trucking company defendants contend that in addition to not  
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1 meeting the requirements of Rule 9(b), National Union has not alleged the source of any duty on  
2 the part of the trucking company defendants to disclose such misconduct to Waste Management.

3 Under California law, the elements of a common-law claim for fraudulent concealment  
4 are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty  
5 to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the  
6 fact with intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would have  
7 acted differently if she had known of the concealed or suppressed fact; and (5) the plaintiff  
8 sustained damage as a result of the concealment or suppression. *See Hahn v. Mirda*, 147 Cal.  
9 App. 4th 740, 748, 54 Cal. Rptr. 3d 527 (2007). “Where material facts are known to one party  
10 and not to the other, failure to disclose them is not actionable unless there is some relationship  
11 between parties which gives rise to a duty to disclose such known facts.” *See LiMandri v.*  
12 *Judkins*, 52 Cal. App. 4th 326, 337 (Cal. App. Ct. 1997). “Such a relationship can only come  
13 into being as the result of some sort of transaction between parties,” such as the relationship  
14 between a seller and buyer, employer and prospective employee, doctor and patient, or parties  
15 entering into a contractual agreement. *Id.*

16 National Union alleges that defendant trucking companies had a duty to disclose material  
17 facts to Waste Management because the trucking companies and Waste Management were in a  
18 transactional relationship. National Union points out that, while *LiMandri* does not define  
19 “transaction,” it does indicate that the scope is not limited to contractual relationships. The  
20 parties dispute whether the trucking company defendants were third-party beneficiaries to a  
21 contract between Waste Management and RDS. Irrespective of whether they were, National  
22 Union has alleged sufficiently that the trucking companies had a transactional relationship with  
23 Waste Management that give rise to a duty to disclose intentionally concealed or suppressed  
24 facts. The trucking companies entered onto and dumped waste at KLC, knowing that Waste  
25 Management permitted them to do so in the belief that all of the loads were processed properly  
26 and paid for through RDS.

**3. Trespass, Invasion of Right of Private Occupancy, and Negligent Disposal of Material**

Defendants' contentions that the SAC fails to state claims for trespass, invasion of the right of private occupancy, and negligent disposal of material are based on the same arguments that they assert with respect to National Union's claim for civil conspiracy. As addressed above, the SAC alleges sufficiently that Defendants entered into a conspiracy to defraud Waste Management. Accordingly, the pleading contains sufficient factual allegations to support claims that the trucking companies knew that their entry into KCL was wrongful.

Defendants also contend that the applicable statutes of limitations for trespass and injury to real property preclude any recovery for these claims based on activities that occurred more than three years before National Union filed its original complaint on March 29, 2010. However, each of these claims includes an allegation that Defendants concealed their activities in order to prevent Waste Management from discovering them and thus tolled the limitations period.

"When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Ra Med. Sys. v. PhotoMedix, Inc.*, 373 Fed. Appx. 784, 787 (9th Cir. 2010) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)). Here, National Union's allegations are sufficient to permit it to claim that the applicable statutes were tolled.

**B. Premier Recycle's Motion to Strike Prayer for Punitive Damages**

Defendant Premier Recycle Co. moves to strike the prayer for punitive damages, arguing that California law does not allow recovery of punitive damages by an assignee or subrogee. "Because a purely personal tort cause of action is not assignable in California, damages for emotional distress are not assignable. The same is true of a claim of punitive damage." *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 942 (1976) (citations omitted). Under California law, "nonassignable claims are not subject to subrogation absent express statutory authorization." *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*, 30 Cal. App. 4th 1373, 1384 (1994).

As it did with its original complaint, National Union acknowledges that the inclusion of a prayer for punitive damages is in error. Accordingly, Paragraphs 74 and 99 and Item 2 of the Prayer for Relief will be stricken from the complaint.

**ORDER**

Accordingly, the motion to dismiss is granted with respect to JLV Equipment, with leave to amend. The motion to strike the prayer for punitive damages is also granted. Any amended complaint must be filed within thirty days (30) days of the date this order is filed. The motions to dismiss otherwise are denied. Defendants shall file their answers within thirty (30) days of the date this order is filed.

IT IS SO ORDERED.

DATED: May 17, 2011

  
JEREMY FOGEL  
United States District Judge